IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 394

RKO RADIO PICTURES, INC., A CORPORATION, LOEW'S INCORPORATED, A CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, A CORPORATION, PARAMOUNT PICTURES INC., A CORPORATION, BALABAN & KATZ CORPORATION, A CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORPORATION (FORMERLY KNOWN AS VITAGRAPH, INC.), A CORPORATION, WARNER BROS. PICTURES, INC., A CORPORATION, WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, A CORPORATION, AND WARNER BROS. THEATRES, INC., A CORPORATION,

Petitioners,

vs.

FLORENCE B. BIGELOW, MARION B. KOERBER, JOHN E. BLOOM AND WILLIAM C. BLOOM,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable The Chief Justice of the United States and Associate Justices of the Supreme Court:

Your petitioners respectfully pray that this honorable Court issue its writ of certiorari to review the decision of the Circuit Court of Appeals for the Seventh Circuit,

handed down June 20, 1947, which affirmed a final injunction decree entered October 16, 1946, by the District Court for the Northern District of Illinois, Eastern Division.

The decree results from charges by private litigants, business competitors of petitioners, that petitioners conspired to violate the antitrust laws in several respects in the distribution and exhibition of motion pictures in Chicago. The decree enjoins everything charged and more, whether done by petitioners individually or concertedly, including normal business practices in which petitioners' competitors, including respondents, are free to engage.

Except as to one of the things enjoined, there has been no lawful adjudication of petitioners' guilt of conspiracy or of any threatened damage to respondents. Instead, petitioners' guilt and the threat of damage to respondents have been presumed on all counts because a jury, in a prior proceeding, found petitioners guilty and respondents damaged with respect to at least one aspect of the conspiracy charged.

The trial court reached this result in part from its erroneous conception of estoppel by verdict, which caused it to enter "findings" against petitioners as a matter of law, without any consideration of evidence of the facts "found."

The Circuit Court of Appeals arbitrarily refused petitioners a review of the grounds of the District Court's action, but instead upheld the "findings" upon an issue not before it by asserting that they were supported by evidence, notwithstanding petitioners were denied any opportunity to be heard on the supposed evidence.

In addition, the District Court made, and the Circuit Court of Appeals affirmed, provisions in the injunction which are not supported by any "findings" or by any evidence in the record.

These actions, the necessary details of which appear in the following Statement, have laid upon petitioners the burdens and penalties of guilt, without their ever having been adjudged guilty in accordance with the essential requirements of due process of law.

OPINION BELOW.

The opinion of the Circuit Court of Appeals appears at page 324 of volume I of the Transcript of Record and is reported officially as *Bigelow* v. *RKO Radio Pictures*, 7 Cir. 1947, 162 F. 2d 520 (Adv. Shts. Sept. 8, 1947).

STATEMENT.

Petitioners, defendants below, are five distributors and two exhibitors of motion pictures doing business in Chicago (I, 2, 3).* Respondents are exhibitors operating the Jackson Park, a neighborhood picture theatre on the south side of Chicago, approximately eight miles from the Loop or downtown district (I, 4).

Respondents filed a complaint in the District Court on July 28, 1942 which charged violations of the Sherman Act and demanded both damages and injunctive relief (I, 2). It alleged that petitioners had conspired to maintain in Chicago a so-called system of release, including a pattern of successive exhibition periods, or runs; to introduce double feature programs into Chicago, and to refuse to license respondents to exhibit pictures in their theatre until after such pictures had been exhibited in competing theatres of exhibitor petitioners (particularly, the Maryland and Jeffery, two comparable neighborhood theatres located within a mile of respondents' theatre, which played one week ahead of the Jackson Park). Petitioners denied these allegations (I, 12-61).

Respondents' claim for damages was tried to a jury beginning February 14, 1944 (I, 68; II, 86). Conflicting evidence was introduced concerning the conspiracy as alleged (II, 105 to IV, 2090). In addition, an issue was tried as to whether petitioners also had conspired to fix minimum admission prices in Chicago picture theatres (III, 1165-1168).

* Citations to the Transcript of Record are to volume and page—for example, pages 2 and 3 of volume I are cited (I, 2, 3).

The trial judge instructed the jury:

> "If, however, you find * * * that the defendants have agreed, combined or conspired to accomplish *one or more of the objects charged by plaintiffs* * * * and that in pursuance thereof the defendants have committed acts which have injured the plaintiffs in their business or property, then you must find from the evidence the amount of the damages, if any, suffered by the plaintiffs as a direct result of such injury." (Emphasis supplied.) (III, 1276.)

The jury returned a general verdict for respondents, finding damages, and judgment for treble damages was entered March 14, 1944 (I, 74-75).

Pending the outcome of an appeal from the judgment for damages, the District Court, with the consent of the parties, held in abeyance respondents' claim for equitable relief (I, 81).

Petitioners appealed to the Circuit Court of Appeals (I, 80), which held respondents' evidence sufficient to go to the jury on the charges of conspiracy but insufficient to prove damage, and reversed the judgment. *Bigelow* v. *RKO Radio Pictures*, 7 Cir. 1945, 150 F. 2d 877.

Respondents obtained a writ of certiorari from this Court, which reversed the Circuit Court of Appeals and affirmed the judgment of the District Court, holding that there was sufficient evidence to permit the jury to find that respondents had been damaged by their inability to obtain pictures for their theatre until after such pictures had been exhibited by exhibitor petitioners in competing theatres. *Bigelow* v. *RKO Radio Pictures*, 1946, 327 U. S. 251, 262, 266.

This Court held that while there was evidence tending to support the other claimed objects of the conspiracy:

> "The jury could have found that the *only unlawful action* taken by respondents [petitioners now] was in

> conspiring to prevent petitioners' theatre from bidding in open competition against other exhibitors for a preferred place in *an otherwise lawful system of release.*" (Emphasis supplied.) (327 U. S. at pp. 261-262.)

On April 8, 1944, after the mandate of this Court was received in the District Court (I, 82), respondents filed a supplemental complaint alleging that "by its general verdict the said jury has adjudicated" the allegations of fact in the original complaint and that "the general verdict of the jury as approved by this Court and affirmed by the Supreme Court of the United States constitutes an estoppel by verdict between the parties hereto in favor of plaintiffs on all issues of fact which were in issue before the jury in this suit" (I, 87).

The supplemental complaint also alleged that the conspiracy charged in the original complaint had continued and that respondents had suffered additional damages. It prayed for equitable relief and for additional treble damages.

Petitioners denied the allegations of the supplemental complaint (I, 92-100).

There has been no trial of the claim for additional damages, which still pends in the trial court, but proceedings were had before the trial court, sitting as a chancellor, which disposed of respondents' claims for equitable relief entirely upon the basis of the estoppel by verdict alleged in their supplemental complaint.

Respondents moved for the entry of an injunction decree (I, 85, 101). Petitioners urged that they were entitled to be heard on the evidence touching the merits of the claim for equitable relief and to have the chancellor's independent findings upon such evidence (I, 102, 104, 147, 148, 150, 152).

Respondents denied that petitioners had any right to present evidence or to have the chancellor's independent

findings on any issue of fact and insisted that by virtue of the claimed estoppel by verdict an injunction should issue forthwith (I, 104, 106, 122).

The issue of estoppel by verdict was set down for separate hearing (I, 109). At that hearing there was introduced into evidence, for the specifically limited purpose of enabling the chancellor to determine what facts had been found by the jury, the complete record of the trial and appeals of the damage claim, including the transcript of evidence heard by the jury (I, 120-121). Such record was not received as primary evidence of the facts (I, 120-121).

Both sides submitted proposed findings of fact and conclusions of law (I, 162, 167). The chancellor on June 26, 1946 entered those proposed by respondents (I, 174). The portion thereof entitled "Findings of Fact" actually contained no findings made from any evidence of the facts recited, but was the chancellor's ruling, under the allegations of estoppel by verdict, as to what issues of fact had been concluded by the verdict and judgment in the damage trial. This is shown clearly by the introductory paragraph of the "findings," which is,

> "That by virtue of the verdict of a jury entered herein on March 10, 1944, and a judgment entered thereon on March 14, 1944, which said verdict and judgment have been affirmed by the decision of the Supreme Court of the United States rendered on February 25, 1946, there has been created an estoppel by verdict which concludes any further adjudication of the following factual issues, all of which have been concluded in favor of plaintiffs:" (I, 174).

The chancellor "found," among other things, that petitioners had maintained a system of releasing pictures in successive weeks, had fixed minimum admission prices and had prevented respondents from licensing pictures on

a competitive market by giving petitioner exhibitors first chance to negotiate for run and clearance against the Jackson Park, notwithstanding respondents' theatre was superior to the Maryland and was able and willing to pay for a run ahead of the Maryland and "day and date" (concurrent) with the Jeffery (I, 175-178).

The only "finding" of damage or threatened damage was that the conspiracy and contracts made pursuant thereto "irreparably injure the plaintiffs' business in that by the operation thereof they are prevented from buying a run of film in an open and competitive market and are forced thereby to accept for exhibition film which has already been shown in the neighborhood of said theatre by the theatres owned by exhibitor defendants and the plaintiffs are thereby prevented by said conspiracy from buying a run of pictures day and date with the Warner Jeffery and one week in advance of the B & K Maryland" (I, 177).

The chancellor did not "find" that the successive weeks of release were unreasonable or that they had injured respondents, or that minimum admission prices had injured respondents. There was no "finding" whatever on the subject of double features.

The chancellor forthwith ordered respondents' counsel to submit a decree (I, 179), which subsequently was entered, with slight modifications (I, 279). The decree was based entirely on estoppel by verdict. It began:

> "1. That the issues raised by the allegations contained in paragraphs 2 and 3 of plaintiffs' supplemental complaint [estoppel by verdict] and defendants' answers thereto are hereby resolved in favor of plaintiffs and against the contentions of defendants, and the parties hereto are precluded by the prior judgment entered herein on March 14, 1944 as affirmed by the Supreme Court of the United States,

from again litigating in this suit the issues of fact raised by the original complaint herein and defendants' answers filed thereto." (I, 279.)

The decree contained provisions safeguarding respondents' right to compete freely for any playing position or run desired for their theatre. To this end, it restrained petitioners, with respect to the south side of Chicago, from restricting pictures to theatres of petitioner exhibitors, from preventing respondents from obtaining at fair rentals films suitable for first run, from withholding pictures from respondents until the exhibition value thereof had been lost, from granting arbitrary protection or clearance over the Jackson Park and from preventing respondents from negotiating for pictures at the same time as petitioner exhibitors (I, 280, 281).

The decree also restrained petitioners from preventing respondents from buying a run of pictures one week in advance of the Maryland at fair film rentals (I, 281).

In addition, the decree enjoined generally, but without describing it, "the conspiracy to restrain and to monopolize interstate trade and commerce in motion picture films, described as the Chicago system of release" (I, 279, 280). It enjoined petitioners, both individually and collectively, from contracting with respect to minimum admission prices, from exhibiting any picture on a first run for longer than two weeks or on any other run for longer than one week in a theatre of an exhibitor petitioner, from granting uniform clearance or waiting time between first and the next succeeding run, and from showing double features in a theatre of an exhibitor petitioner when the effect would be to diminish the number of "clear" (unplayed) pictures available to respondents (I, 280-283).

Petitioners, prior to the entry of said decree, filed objections to it and a motion to strike the "findings of fact" on the ground, among others, that the chancellor had heard

no evidence touching the merits of the plaintiffs' claim for equitable relief and had erred, as a matter of law, in his rulings on estoppel by verdict (I, 185, 192). Petitioners objected also that the limitations placed by the decree upon the duration of runs, upon the granting of first run clearance and upon the use of double features by petitioners went beyond any "finding" made; that the injunction against the Chicago system of release was fatally vague and that the whole decree, except those portions protecting respondents' right to compete for playing position, was punitive rather than remedial. All of these objections were overruled (I, 278, 279).

Petitioners appealed (I, 285). Their assignment of errors (I, 288) and briefs presented to the Circuit Court of Appeals the same objections to the "findings" and decree outlined above. Respondents advanced an alternative theory to support the decree—that if the law of estoppel by verdict would not support the "findings" and decree, the doctrine of estoppel by judgment, or *res judicata,* would support them.

No issue was before the Circuit Court of Appeals as to the weight of the evidence which the jury had heard but which the chancellor had refused to weigh, or as to the sufficiency of such evidence to support the "findings" entered solely on the basis of estoppel by verdict.

The Circuit Court of Appeals affirmed the decree except to strike out the provision (Par. V (e); Record I, 281) which would have given respondents a vested right, irrespective of competition, to a run ahead of the Maryland (I, 330). At one point in its opinion it said:

> "The original complaint stated but one cause of action which, if proved, entitled the plaintiffs to two kinds of relief, namely, damages and an injunction. The same judge that presided in the trial of the damage action heard the plaintiffs' application for an injunction. One phase of this complaint was submitted to the jury which returned its verdict for damages,

upon which judgment was entered and finally affirmed by the Supreme Court. The other phase was tried by the presiding judge as a chancellor, who has stated his findings of fact and conclusions of law and upon them entered the decree from which the defendants have appealed." (I, 325-326; 162 F. 2d at p. 522.)

If the Circuit Court of Appeals meant by the above language that the trial judge based his "findings" and decree upon evidence which he heard while presiding at the jury trial, it was laboring under an error of fact. The entire record shows, and both the "findings" and the decree state, that the chancellor acted entirely on the theory of estoppel by verdict, because of which he considered himself precluded from making any independent findings.

At another point the Circuit Court of Appeals said:

"The trial court was not bound to hear any more evidence than the jury had heard and upon which evidence the jury had found the existence of the conspiracy and the very substantial damages to the plaintiffs. Upon that same evidence, the District Court could have based its decree after making proper findings. If the District Court took a narrow view of that evidence, we would not feel bound to do likewise, because the entire record is before us. The record evidence if considered in its entirety supports the findings. It is only by looking through this restricted scope or view of the evidence that the findings are deemed insufficient. We decline the invitation to play hide and seek in the record in an effort to evaluate the District Court's findings, looking only through the scope of estoppel by verdict. The District Court had the entire record before it. If it chose to take a narrow view of the evidence, we are not bound to follow it where a consideration of all the evidence will support its findings without question.

"We put to one side the refinements of argument, orally and in the briefs, as to the distinction between estoppel by verdict and estoppel by judgment, and look to all the evidence in this case that was submitted

to the trial court on the first hearing, in order to determine whether there is evidence to sustain the findings that the court actually made. When so considered, there is an abundance of evidence to support the District Court's findings of fact. There can be no question of the defendants' guilt in maintaining the unlawful conspiracy alleged in the complaint. The evidence in the record supports the trial court's findings, and there was no error in denying the defendants' request for findings as the evidence did not compel the findings they requested." (1, 327; 162 F. 2d at pp. 522-523.)

From the above language it appears that the Circuit Court of Appeals realized that the chancellor had based his "findings" entirely upon estoppel by verdict. Yet the court deliberately refused to rule on the questions of law presented by the record and instead ruled that the evidence which the chancellor had refused to weigh was sufficient to "support" those findings, as if the chancellor had weighed that evidence and based his findings and decree thereon.

The following is the only discussion in the opinion of the provisions in the decree which are not supported by any "findings":

"As to the double featuring, we found in the first appeal of this case that while the double featuring in and of itself was not illegal, when used to further the conspiracy which we found to be illegal, the double featuring became tainted with illegality. *Bigelow* v. *R. K. O. Radio Pictures*, 150 F. 2d 877, 885. Therefore, the District Court may very properly enjoin the use of double features where used with the intent and purpose and where such use has the effect of preventing the plaintiffs from obtaining pictures before the defendants have channeled them through the conspiratorial system. It is only the use of the double featuring within the bounds of the conspiracy that was enjoined. This is proper.

"This defendant [Balaban & Katz] also complains that the decree should not enjoin the defendants from

> a first run in the Loop in excess of two weeks and a subsequent run in excess of one week without any waiting time, because their competitors are not so limited. The short and complete answer to this contention is that their competitors are not in the conspiracy. The provisions of the decree complained of were reasonably adapted to breaking up the conspiracy, a part of which was the method of release, and such provisions were therefore properly entered." (I, 328; 162 F. 2d at p. 523.)

These paragraphs assume petitioners' guilt of conspiracy to do the things enjoined, notwithstanding the total absence of any "finding" or evidence of such guilt. They thus beg the very issue presented to the court by the record.

Of course, the Circuit Court of Appeals had not "found" petitioners' guilt on any issue of conspiracy when the claim for damages was before it in the prior appeal. At that time the court was concerned only with whether there was sufficient evidence of conspiracy to go to the jury.

The court was in error, moreover, in stating that the limitation upon double featuring contained in the decree applies only "within the bounds of the conspiracy." That provision of the decree does not even mention conspiracy, but in explicit terms enjoins "the defendants or any of them" (I, 282-283).

The Circuit Court of Appeals took no notice of petitioners' contention that the sweeping prohibition in the decree of an undefined "Chicago system of release" was fatally vague.

Petitioners on July 8, 1947 filed a petition for rehearing (I, 332) which pointed out that the chancellor's "findings of fact" in reality were rulings of law, that they had not been based upon any consideration of evidence to prove the facts therein recited and that, therefore, no question

of the weight or sufficiency of any evidence of such facts was before the reviewing court.

The petition for rehearing raised the constitutional point now carried to this Court, that the Circuit Court of Appeals' decision doubly denied petitioners due process of law—first, by refusing them a review of the grounds on which the chancellor based his "findings" and decree, while affirming them on a new theory not presented by the record, and second, by denying petitioners a day in court in which to have the evidence actually weighed, and real findings of fact made, after an opportunity for argument.

The petition for rehearing was denied without opinion on August 7, 1947 (I, 341).

JURISDICTION.

Petitioners invoke the jurisdiction of this Court to grant a writ of certiorari to review the judgment of the Circuit Court of Appeals by virtue of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U.S.C. § 347(a).

QUESTIONS PRESENTED.

1. Whether the trial court's ruling of estoppel by verdict, which the Circuit Court of Appeals refused to review, was erroneous and adjudicated the guilt of petitioners upon charges of conspiracy without their ever having their day in court on such charges.

2. Whether the Circuit Court of Appeals denied petitioners the substance of their right of appeal by refusing to review the trial court's rulings on estoppel by verdict, notwithstanding that was the only issue relating to the facts of this case upon which petitioners were given a hearing in the trial court and the only such issue which petitioners could bring up for review.

3. Whether the Circuit Court of Appeals denied petitioners due process of law by affirming the "findings of fact" and decree on the ground that there was evidence to support them, notwithstanding the trial court never weighed such evidence or based its "findings" and decree thereon and the Circuit Court of Appeals does not purport to have weighed the evidence or to have made any findings on its own initiative.

4. Whether, even if what the Circuit Court of Appeals did could be termed weighing the evidence or finding the facts, petitioners were denied a fair hearing because they had no opportunity to argue the weight of the evidence.

5. Whether the Circuit Court of Appeals erroneously affirmed provisions in the decree which regulate petitioners' business punitively, instead of remedially, and which find no support either in the "findings" or in any evidence from which actual findings could have been made.

6. Whether, under the authority conferred by Section 16 of the Clayton Act, a district court, at the suit of a private litigant, may enjoin conduct which is not shown to threaten any loss or damage to the plaintiff.

7. Whether the Circuit Court of Appeals erred in affirming the injunction against the "Chicago system of release," when the decree does not describe such "system" or otherwise define the conduct intended to be enjoined.

8. Whether the Circuit Court of Appeals erred in declaring that a claim for damages and a claim for equitable relief arising under the antitrust laws out of the same alleged conspiracy constitute a single cause of action or claim for relief.

9. Whether the entire course of proceedings in this case, subsequent to the decision of this Court on the first damage claim, comprises a series of errors having such effect that petitioners, having been adjudged liable to respondents in damages because of one unlawful act, are presumed guilty of every other charge made against them without any actual hearing or determination from the evidence of such further charges, contrary to the essential requirement of a day in court guaranteed by the due process clause of the Fifth Amendment.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The entire record in this case presents a situation where the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the District Court as to call for an exercise of this Court's powers of supervision.

2. The decision of the Circuit Court of Appeals is in conflict with applicable decisions of this Court on each of the following points:

(a) Estoppel by verdict, by reason of a prior adjudication, concludes only issues of fact actually and necessarily decided in the prior action.

Cromwell v. *County of Sac*, 1876, 94 U. S. 351, 352-353.

Russell v. *Place*, 1876, 94 U. S. 606, 608.

Fayerweather v. *Ritch*, 1904, 195 U. S. 276, 300, 306.

(b) This Court already has decided, in reviewing the damage judgment in this case, that while the jury which rendered the damage verdict might have decided that petitioners had conspired in other respects as claimed, it also might have decided that petitioners' only unlawful conduct was in conspiring to prevent respondents' theatre from competing for a preferred place in an otherwise lawful system of release.

Bigelow v. *RKO Radio Pictures*, 1946, 327 U. S. 251, 261-262.

(c) It is a denial of due process for a reviewing court to dispose of an appeal upon questions not submitted on the record and contrary to the theory on which the trial court decided the case.

Lutcher & Moore Lumber Co. v. *Knight*, 1910, 217 U. S. 257, 267.

(d) It is a denial of due process to affirm findings on the ground that there is evidence to support them,

when the trier of the facts has not actually weighed the evidence and reached the conclusions which he deems it to justify after hearing argument thereon.

Morgan v. *United States,* 1936, 298 U. S. 468, 480-482.

Morgan v. *United States,* 1938, 304 U. S. 1, 18-20.

(e) Relief in equity is remedial, not penal, and an injunction in an antitrust case should not impose penalties in the guise of preventing future violations or impose on defendants new duties which place them in a different class from others under the law, or be so vague as to leave doubt as to the exact nature of the conduct enjoined.

Hartford-Empire Co. v. *U. S.,* 1945, 323 U. S. 386, 409-410.

3. This Court apparently never has construed the authority of the district courts to issue injunctions in suits by private parties under Section 16 of the Clayton Act, which authorizes injunctions only against "threatened loss or damage to the plaintiffs," as contrasted with their authority in suits by the United States under Section 4 of the Sherman Act or Section 15 of the Clayton Act to "prevent and restrain violations of this Act." This case squarely raises the important general question whether it is not necessary, in a private suit, that the courts confine their injunctions to matters which not only are contrary to the antitrust laws but also are found to threaten the plaintiff with some loss or damage distinct from that suffered by the public generally.

4. This Court has never expressly decided whether a claim for damages under Section 7 of the Sherman Act or Section 4 of the Clayton Act can be the same cause of action as a claim for equitable relief under Section 16 of the Clayton Act. This raises a novel, important and broadly applicable question as to whether a private liti-

gant, having prosecuted to successful conclusion one of such claims for relief, can obtain relief upon the other claim solely on the theory of a cause of action already adjudicated.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all of the proceedings herein, and to the end that the judgment of the Circuit Court of Appeals for the Seventh Circuit may be reversed by this Court and that your petitioners may have such other and further relief in the premises as to this Court may seem just; and your petitioners will ever pray.

RKO RADIO PICTURES, INC.,
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TWENTIETH CENTURY-FOX FILM CORPORATION,
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WARNER BROS. THEATRES, INC.,
Petitioners.

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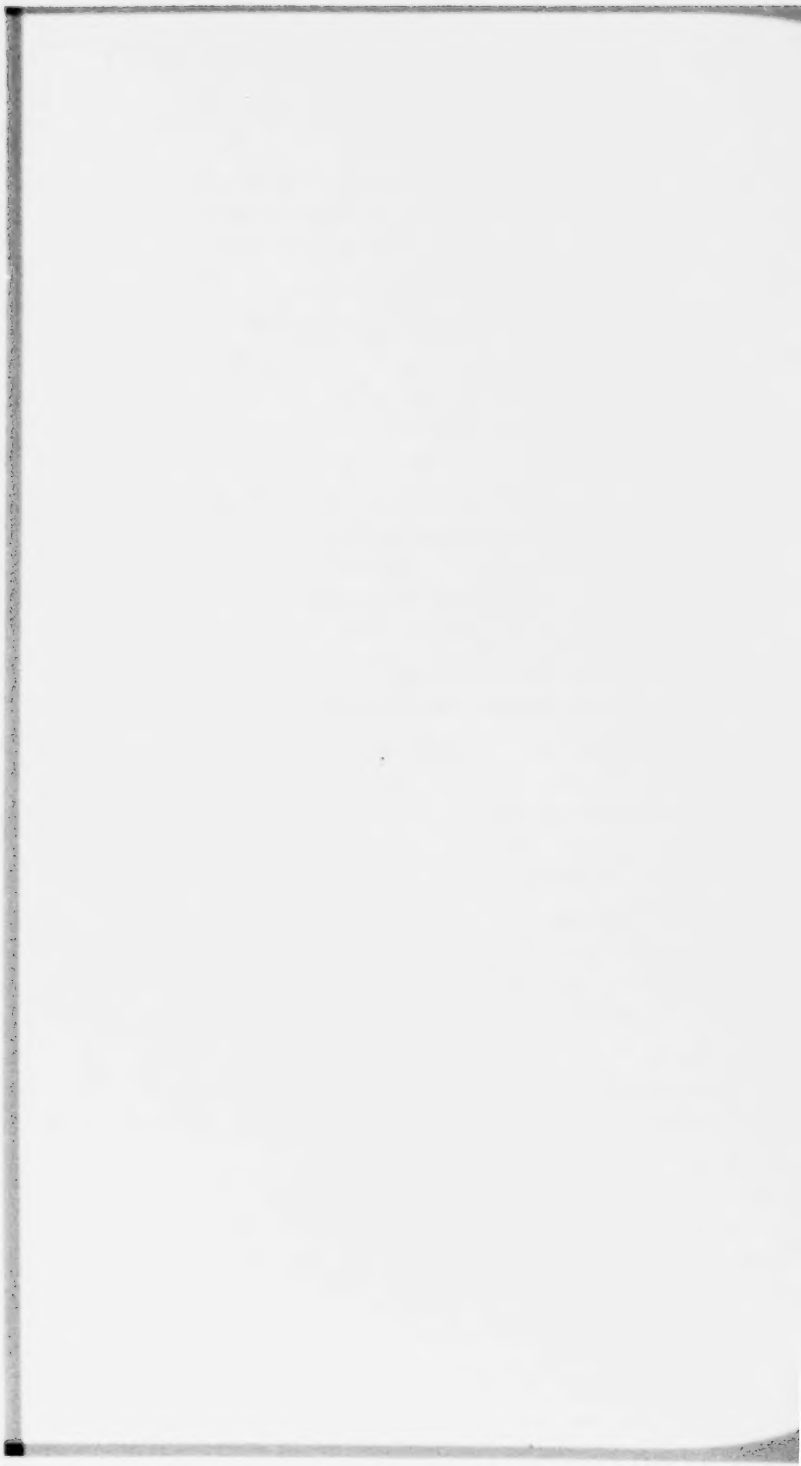

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Petitioners,

vs.

FLORENCE B. BIGELOW, MARION B. KOERBER, JOHN E. BLOOM AND WILLIAM C. BLOOM,

Respondents.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A. THE DISTRICT COURT ERRED IN ITS RULINGS OF ESTOPPEL BY VERDICT, THEREBY DENYING PETITIONERS THEIR RIGHT TO A TRIAL OF ISSUES OF FACT AS TO WHICH THEY SHOULD NOT HAVE BEEN ESTOPPED.

The disposition of respondents' claim for equitable relief has proceeded as if, because petitioners have been

guilty of one thing, they must be guilty of everything. The doctrine of estoppel by verdict was erroneously extended by the trial court to every issue of fact heard by the jury, thus transforming it into a conclusive presumption of guilt.

1. ESTOPPEL BY VERDICT PROPERLY ARISES ONLY AS TO ISSUES OF FACT NECESSARILY DECIDED IN PRIOR LITIGATION.

The controlling principles of estoppel by verdict are well established. It is based upon the judgment rendered in a prior suit, it can be raised only in a subsequent suit between the same parties on a different cause of action and it arises only as to issues of fact which were actually and necessarily decided in the prior suit. It does not arise as to issues of fact which merely were involved in the prior suit and may or may not have been decided therein. What issues of fact were decided in the prior suit must appear from the record therein and the burden is upon the party claiming the estoppel to show what those decisions were.

Cromwell v. *County of Sac*, 1876, 94 U. S. 351, 353.
Russell v. *Place*, 1876, 94 U. S. 606, 608.
Fayerweather v. *Ritch*, 1904, 195 U. S. 276, 306.
Hanna et al. v. *Read et al.*, 1882, 102 Ill. 596, 602.
Theological Seminary v. *The People*, 1901, 189 Ill. 439, 443-444.
Hoffman v. *Hoffman*, 1928, 330 Ill. 413, 417.

The District Court applied the doctrine of estoppel by verdict to this case as if the conspiracy charged were an indivisible whole, so that an adjudication of petitioners' guilt of any part of it necessarily established their guilt of every part of it. This assumption not only is unwarranted by reason, when a conspiracy to do a number of

different acts is charged, but it flies in the face of the instruction in this case which told the jury that it might find petitioners guilty of "one or more" of the claimed objects of the conspiracy (III, 1276).*

2. THIS COURT HAS HELD THAT ONLY ONE OF RESPONDENTS' SEVERAL CHARGES OF CONSPIRACY NECESSARILY WAS DETERMINED BY THE VERDICT AND JUDGMENT IN THE PRIOR LITIGATION.

This Court, in reviewing respondents' judgment for damages, noted that there was evidence from which the jury might have found conspiracy in other respects charged by respondents, but it also held:

> "The jury could have found that the *only* unlawful action taken by respondents [petitioners now] was in conspiring to prevent petitioners' theatre from bidding in open competition against other exhibitors for a preferred place *in an otherwise lawful system of release.*" (Emphasis supplied.) *Bigelow* v. *RKO Radio Pictures,* 1946, 327 U. S. 251, 261-262.

This Court also decided that respondents' inability to play pictures on earlier runs was the injury for which the jury awarded them damages (327 U. S. at p. 262).

Petitioners are not seeking to escape the just consequences in equity of the jury's verdict and the judgment thereon. They admit that upon the issues of fact actually and necessarily decided by the jury an estoppel by verdict has arisen; that to that extent the chancellor's rulings, by his so-called "findings of fact," are correct, and that the decree is proper in so far as it undertakes only to prevent a repetition of the same wrongful conduct and damage.

* Citations to the Transcript of Record are to volume and page—for example, page 1276 of Volume III of the Record is cited (III, 1276).

A correct ruling on the issue of estoppel by verdict in this case would limit the estoppel to the one claim of conspiracy and resulting damage necessarily decided by the jury and, respondents standing on their allegations of estoppel, the decree should be limited to its several provisions (Pars. V (a-d), VI and VII; Record I, 280-281) designed to secure to respondents in the future their right to compete freely for any playing position which they desire.

3. THE DISTRICT COURT ERRONEOUSLY EXTENDED THE ESTOPPEL BY VERDICT TO EVERY FACT WHICH HAD BEEN IN ISSUE BEFORE THE JURY IN THE PRIOR LITIGATION.

The trial court, however, carried the doctrine of estoppel by verdict much farther. In addition to a general conclusion that petitioners were estopped as to everything which had been in issue in the damage trial, the chancellor expressly ruled, or "found," on the theory of estoppel by verdict, that petitioners had conspired to set up and maintain an illegal system of release and as a part thereof to fix minimum admission prices in theatres (I, 174-177).

The chancellor did not include in his detailed rulings any "finding" on the subject of double features, which was one of the conspiracy issues submitted to the jury.

Neither did the chancellor "find," as part of his estoppel ruling, any damage to respondents from any part of the claimed conspiracy except the denial to respondents of their right to compete freely for a better playing position (I, 177).

B. THE DISTRICT COURT'S INJUNCTION WENT EVEN BEYOND WHAT COULD BE JUSTIFIED UNDER ITS ERRONEOUS CONCEPTION OF ESTOPPEL BY VERDICT.

The decree (I, 279) goes beyond the express findings which the trial court based on estoppel by verdict, and even beyond any "findings" which the chancellor could have made pursuant to his erroneous theory that estoppel by verdict had concluded every issue of fact which was before the jury.

The decree enjoins the so-called system of release and minimum admission prices, as to which the chancellor "found" conspiracy (erroneously, as petitioners contend), but did not "find" any threatened damage to respondents (I, 279-281).

The decree, in addition, enjoins certain aspects of double featuring, limits the duration of runs in petitioners theatres and prohibits uniform first run clearance, as to all of which there are no "findings" of either conspiracy or threatened damage (I, 281-283). There was not even an issue of fact before the jury as to the unreasonableness of the duration of any runs or of the first run clearance which are enjoined, or as to any claimed damage to respondents from those things, so that even the general doctrine of estoppel by verdict, as the chancellor misunderstood it, does not suggest any justification for those portions of the injunction.

C. THE CIRCUIT COURT OF APPEALS DENIED PETITIONERS DUE PROCESS OF LAW BY REFUSING TO REVIEW THE ESTOPPEL BY VERDICT ISSUES PRESENTED BY THE RECORD AND INSTEAD ARBITRARILY SUSTAINING THE DECREE UPON A GROUND NOT PRESENTED BY THE RECORD.

When petitioners sought to have these matters reviewed by the Circuit Court of Appeals, they were met with a ruling that the evidence sufficed to support the "findings of fact" and decree. That court impatiently brushed aside the issues of estoppel by verdict, as if petitioners were resorting to legal hocus-pocus to avoid the real issues, when, in fact, it was respondents who pleaded estoppel by verdict and insisted upon it against petitioners' claim that the facts should be found from evidence.

The Circuit Court of Appeals erred in refusing to decide the issues presented by the record which challenged the correctness of the trial court's ruling on estoppel by verdict, and instead undertaking to decide the case on the entirely new ground of the sufficiency of evidence which the trial court held itself precluded from weighing.

In *Lutcher & Moore Lumber Co.* v. *Knight*, 1910, 217 U. S. 257, a Circuit Court of Appeals, on its own initiative, had affirmed a judgment at law on the ground that the matters concerning which the appellant assigned error were cognizable only in equity, although the trial court, with the acquiescence of all parties, had heard the entire case as one at law. This Court cited *Burbank* v. *Bigelow*, 154 U. S. 558, wherein it had held that a party could not raise such a question for the first time on appeal, and said:

> "Applying this doctrine to the facts and circumstances which we have previously stated, we are of opinion that it inevitably results that the effect of the action of the Circuit Court of Appeals was substan-

tially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard." (217 U. S. at p. 267.)

The issue of estoppel by verdict which the record in this case presented to the Circuit Court of Appeals was not trivial or merely technical. In *Fayerweather* v. *Ritch*, 1904, 195 U. S. 276, this Court held that an erroneous ruling of estoppel by verdict, holding that an issue of fact had been decided in a prior suit when actually it had not, operated in the subsequent suit to deprive of his property "without any judicial determination of the fact upon which alone such deprivation could be justified" the party against whom the estoppel was raised (195 U. S. at p. 299). In that case the mere claim of such error, regardless of its merit, was held to present a substantial due process question under the Fifth Amendment.

D. THE CIRCUIT COURT OF APPEALS ADJUDICATED THE ISSUES OF FACT AGAINST PETITIONERS WITHOUT THEIR EVER HAVING HAD A DAY IN COURT, BY DECLARING THE EVIDENCE ADDUCED BEFORE THE JURY SUFFICIENT TO SUPPORT THE DECREE, ALTHOUGH NEITHER THAT COURT NOR THE DISTRICT COURT WEIGHED SUCH EVIDENCE OR MADE FINDINGS FROM IT OR GAVE PETITIONERS A HEARING UPON IT.

The Circuit Court of Appeals made no findings of fact. It merely held that "* * * there is an abundance of evidence to support the District Court's findings of fact," thus acknowledging that the "findings" were those of the District Court (I, 327; 162 F. 2d at p. 523). In holding that the evidence heard by the jury "supported" these "findings," the Circuit Court of Appeals had only to apply the rule that "Findings of fact shall not be set aside unless clearly erroneous * * *" (Rule 52(a),

Rules of Civil Procedure; 28 U.S.C., following §723(c)). A decision under that rule is a far cry from a decision following a trial at which the evidence is weighed, with the burden of proof on the plaintiffs, and the facts are found after full argument. It is obvious that neither the District Court nor the Circuit Court of Appeals ever weighed the evidence in order to determine what findings of fact were justified by it.

In *Morgan* v. *United States*, 1936, 298 U. S. 468, at page 481, this Court said:

> **"It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify."**

That statement, made with reference to a quasi-judicial administrative hearing, applies even more forcefully to a court of justice and hits at point-blank range the essence of the error committed by the Circuit Court of Appeals in this case in affirming the findings and decree on the ground that there was evidence sufficient to "support" them. In the above-cited *Morgan* case this Court held that such error was a denial of due process of law.

Even if what the Circuit Court of Appeals did could be construed as a determination of the facts from the supposed weight of the evidence, which it plainly was not, such determination would be less than due process of law because it was done without petitioners having any opportunity to argue the weight of the evidence. *Morgan* v. *United States*, 1938, 304 U. S. 1, 18-20.

E. THE CIRCUIT COURT OF APPEALS ERRONEOUSLY ASSUMED PETITIONERS' GUILT OF CONSPIRACY, AND ASSUMED THREATENED DAMAGE TO RESPONDENTS, IN CONNECTION WITH SOME OF THE CONDUCT ENJOINED BY THE DECREE, WITHOUT THERE HAVING BEEN ANY FINDINGS OF FACT, RULINGS OF LAW, OR EVIDENCE THAT PETITIONERS SO CONSPIRED OR THAT RESPONDENTS WERE THREATENED WITH DAMAGE FROM SUCH CONDUCT.

Even if we put aside the question of estoppel by verdict and the constitutional questions raised by the Circuit Court of Appeals in shifting to the position that there was evidence to support the "findings," as if they had been based upon such evidence in the first instance, the decision of the Circuit Court of Appeals remains gravely erroneous and unjust to petitioners.

The Circuit Court of Appeals apparently felt that if the "findings" could be maintained on some theory, the affirmance of the entire decree presented no serious problems. The court was wrong.

1. THE INJUNCTIONS RESTRICTING THE DURATION OF RUNS, FIRST RUN CLEARANCE AND DOUBLE FEATURING ARE ERRONEOUS FOR LACK OF ANY SUPPORTING FINDINGS OF CONSPIRACY.

We have shown that there are no "findings" of conspiracy with respect to double features, duration of runs or first run clearance, although the decree regulates all of these things. A decretal order not supported by appropriate findings is erroneous. Rule 52(a), Rules of Civil Procedure (28 U.S.C., following § 723(c)); *Hartford-Empire Co.* v. *U. S.*, 1945, 323 U. S. 386, 404. The Circuit Court of Appeals failed to follow its own decision in *Hubsh-*

man v. *Louis Keer Shoe Co.*, 7 Cir. 1942, 129 F. 2d 137, where it said:

> "Findings of fact are like a special verdict, and all the facts essential to entitle a party to judgment must be found; and a judgment rendered on a special finding that fails to find all the essential facts is erroneous." (p. 142.)

2. ALL OF THE INJUNCTIVE PROVISIONS OF THE DECREE, EXCEPT THOSE RELATING TO THE WRONG AND INJURY NECESSARILY FOUND BY THE JURY, MUST FALL FOR WANT OF ANY SUPPORTING FINDINGS OF THREATENED LOSS OR DAMAGE TO RESPONDENTS.

We have shown also that there was no "finding" of any damage or threatened damage to respondents, except such as resulted or might result from their inability to compete for earlier runs. The lack of any showing of damage is fatal to the remaining regulatory provisions of the decree.

The District Court's authority to issue an injunction came from Section 16 of the Clayton Act, which authorized it to issue an injunction at the suit of private parties only "against threatened loss or damage by a violation of the antitrust laws" (38 Stat. 737, 15 U.S.C. § 26). Such authority is far more limited than that granted to the courts by Section 4 of the Sherman Act and Section 15 of the Clayton Act, whereby they are empowered in suits brought by the United States "to prevent and restrain violations of this Act" (26 Stat. 209, 15 U.S.C. § 4; 38 Stat. 736, 15 U.S.C. § 25).

This Court has not expressly decided this question, although it is a very important question of general law. In *Georgia* v. *Pennsylvania R. Co.*, 1945, 324 U. S. 439, this Court touched on the question, without feeling obliged

to resolve it. In that opinion a dissenting minority of the Court clearly stated that a private litigant must show damage to be entitled to relief under Section 16 of the Clayton Act. The majority of the Court did not dispute this proposition but held that the State of Georgia's complaint adequately alleged threatened injury.

3. THERE WAS NO EVIDENCE FROM WHICH THE MISSING FINDINGS COULD HAVE BEEN MADE.

The findings necessary to support the decree in its regulation of the duration of runs, first run clearance and double featuring could not be supplied from the evidence. The record may be searched in vain for any evidence that runs of pictures in petitioners' theatres were unreasonably long; that the duration of first runs was determined concertedly; that any run was extended beyond its normal duration by agreement; that the customary period of clearance following first runs was unreasonable; that double featuring resulted from conspiracy or that any of these things injured respondents. They were injured only by their inability to contract for earlier runs and thereby to enjoy the normal competitive advantages of prior exhibition.

Shortly after the entry of the damage judgment in 1944, and before it had been decided to postpone the application for an injunction pending the outcome of an appeal from that judgment, respondents' counsel submitted a proposed decree to be based upon the evidence adduced before the jury (I, 75). It proposed that the trial judge should consider the jury's verdict as advisory rather than as conclusive upon any issue (I, 76). In that proposed decree, which later was superseded by other drafts, respondents' counsel did not ask for any injunction limiting the length of first runs or abolishing first run clearance or restricting double

featuring (I, 76-79). Evidently counsel did not believe at that time that the evidence heard by the jury would sustain any such provisions in a decree.

The record merely shows that first runs in Chicago generally took place in the Loop, or downtown, district, that such runs were of varying duration and that they usually were followed by three weeks of "clearance" before the next succeeding runs. These facts appear from the license agreements in evidence (II, 487, 492, 495; IV, 1722-1796). The chancellor's conclusions of law, as prepared by respondents' counsel, held that these license agreements "with respect to the exhibition of motion pictures by the theatres described in the complaint" were implements of conspiracy and violated the antitrust laws (I, 178). Since the complaint named only subsequent run theatres on the south side of the city, competing directly with plaintiffs' neighborhood theatre, no adjudication was asked or was made that the contracts with respect to Loop first runs were within the conspiracy or were illegal.

There is no basis in the record for concluding that double features, duration of runs or clearance, as enjoined by the decree entered, had any necessary or demonstrated connection with the determination of playing priorities among competing theatres, or that they differ from the trade practices which prevail wherever motion pictures are shown or from the conditions which would obtain spontaneously under the most free competitive conditions imaginable.

There has not been here the careful consideration of the effect of the injunction which this Court has given to decrees in recent antitrust cases, such as *Hartford-Empire Co.* v. *U. S.*, 1945, 323 U. S. 386 and *United States* v. *National Lead Co.*, June 23, 1947, ... U. S. ....., 15 U. S. Law Week 4675.

4. THE INJUNCTIONS RESTRICTING THE DURATION OF RUNS, FIRST RUN CLEARANCE AND DOUBLE FEATURING ARE ARBITRARY, PUNITIVE AND GROSSLY UNFAIR AND DAMAGING TO PETITIONERS.

On this record, these restrictions upon petitioners' businesses are arbitrary in the fullest sense of the word. They go beyond the "findings", beyond the evidence and beyond any reasonable inferences from them. They do not serve to remedy any wrongful injury respondents have been shown to have suffered, nor will they serve to benefit respondents except in so far as anything which cripples the businesses of petitioner exhibitors may incidentally benefit their competitors, including respondents.

These provisions restrict only the operation of petitioners' theatres. They do not apply to theatres of their competitors, including respondents. The record indicates the enormous competitive disadvantage at which they place exhibitor petitioners. One exhibitor petitioner owns and operates six large, luxurious theatres in downtown Chicago which customarily exhibit pictures on first run in the city (I, 245, 246; II, 368, 369, 432, 623; IV, 1595). There are other theatres not operated by any petitioner which customarily play on the same policy (I, 246; II, 369, 623). In the past these theatres have exhibited films for runs ranging from one week to several months, runs of four to six weeks being common, depending upon the box office attractiveness of the particular picture (I, 245, 246, 275, 276; II, 436, 492; IV, 1616, 1756, 1757). It is obvious that if first runs in petitioners' theatres are limited to two weeks as provided in the decree (I, 282), first runs of the most successful pictures will be diverted into competing theatres, to the incalculable financial injury of exhibitor petitioners. It is likewise obvious that this will restrict the market of

all distributors, both petitioners and others, for their best pictures.

The elimination of uniform first run clearance by the decree (I, 282) must be contrasted with the undisputed evidence in the record that clearance between competing runs is the practice wherever motion pictures are shown (II, 666, 682). No court ever has held that clearance, absent conspiracy and reasonable in extent, is an unlawful restraint of trade. On the contrary, the lawfulness of clearance has been upheld and its business necessity recognized by several decisions.

> *Gary Theatre Co.* v. *Columbia Pictures Corporation*, N. D. Ill. 1940, C.C.H. Fed. Trade Reg. Serv., p. 26,210; aff'd, 7 Cir. 1941, 120 F. 2d 891, 894-895.
>
> *Westway Theatre* v. *Twentieth Century-Fox F. Corp.*, D. Md. 1940, 30 F. Supp. 830, 835; aff'd, 4 Cir. 1940, 113 F. 2d 932.
>
> *United States* v. *Paramount Pictures*, S. D. N. Y. 1946, 66 F. Supp. 323, 341.

Respondents have attempted to justify this portion of the decree by saying that it forbids only uniform clearance and that petitioners still may grant first run clearance if it is not uniform. The superficial plausibility of this argument disappears when it is considered that each first run exhibitor deals constantly with the same distributors and attempts to obtain the same clearance from each, no less favorable in any case than is obtained by his competitors. Under this decree a petitioner exhibitor could negotiate with the distributors for first run clearance only through a scheme of artificial and collusive variability, under pain of contempt if they should bargain for and obtain the same clearance, however reasonable, in any substantial number of instances.

The competitive importance of double featuring is shown by uncontradicted evidence in the record that in 1937, when one of the exhibitor petitioners introduced double feature programs in its theatres, the other exhibitor petitioner, much against its will, was compelled to adopt the same policy to compete successfully for public patronage (III, 1082-1087). Respondents' theatre manager testified that he, likewise, was compelled to exhibit double features in respondents' theatre in order to meet the competition (II, 217, 218). Yet the decree restricts the use of double features in petitioners' theatres which compete with respondents, and leaves respondents and all others free to double feature without like restrictions (I, 282-283).

These limitations upon petitioners' business are punitive rather than remedial. They place petitioners in a different category under the law than other persons in the same business. They regulate their business needlessly, arbitrarily and without justification in law or fact. For these reasons, they come clearly within the condemnation of this Court expressed in *Hartford-Empire Co.* v. *U. S.*, 1945, 323 U. S. 386, 409-410 and *Standard Oil Co.* v. *United States*, 1911, 221 U. S. 1, 77-78.

F. THE CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE INJUNCTION AGAINST THE SO-CALLED SYSTEM OF RELEASE, WHICH IS FATALLY VAGUE FOR FAILURE TO DESCRIBE THE ACTS SOUGHT TO BE ENJOINED.

The injunction against "the conspiracy * * * described as the Chicago system of release" (I, 279, 280) is fatally vague under the holding of this Court in the *Hartford-Empire* case (323 U. S., at p. 410) and clearly violates Section 19 of the Clayton Act (38 Stat. 738, 28 U.S.C. § 383) and Rule 65(d), Rules of Civil Procedure (28 U.S.C.,

following § 723(c)). Neither in the decree nor in the "findings" is there a definition of the "Chicago system of release". The term is without any specific meaning except that given to it by one who uses it. The decree, which does not specify the acts intended to be forbidden by this provision, places every future business operation of petitioners under the shadow of contempt proceedings. Cf. *Swift and Company* v. *United States*, 1905, 196 U. S. 375, 396.

It is no answer to say that petitioners can avoid the punitive restrictions of the decree by not conspiring together, since every provision complained of runs against the several petitioners individually as well as when they are acting in concert.

The Circuit Court of Appeals evidently did not make a careful analysis of the evidence heard by the jury or of the issues submitted to the jury by the instructions. Instead, that court's opinion indicates that it relied largely upon the same basic assumption which the trial court had made—that everything charged by respondents was part of an indivisible conspiracy and that petitioners' demonstrated guilt of any part thereof was sufficient to establish their guilt of all parts and furnished sufficient reason for enjoining every wrongful practice attributed to them by respondents. The result is condemnation and punishment for petitioners without the semblance of a fair trial.

G. THE CIRCUIT COURT OF APPEALS ERRED IN DECLARING THAT A CLAIM FOR TREBLE DAMAGES AND A CLAIM FOR EQUITABLE RELIEF UNDER THE ANTITRUST LAWS COMPRISE THE SAME CAUSE OF ACTION OR CLAIM FOR RELIEF.

The Circuit Court of Appeals asserted that the claim for damages and the claim for equitable relief set forth in plaintiffs' original complaint were the same cause of action. Probably that thought was suggested to the court by respondents' contention that if estoppel by verdict would not support the decree, estoppel by judgment, or *res judicata,* would justify it. Estoppel by judgment is much broader than estoppel by verdict, extending to every issue which was or could have been litigated in the prior suit. To make that contention respondents had to and did claim only one cause of action, because estoppel by judgment applies only in a subsequent suit between the same parties upon the same cause of action, whereas estoppel by verdict arises only when the subsequent proceeding is upon a new cause of action. (See cases cited page 22 above.)

The statement of the Circuit Court of Appeals raises a serious question of general law because, if what it said were true, the granting of equitable relief in antitrust cases would be largely removed from the control of the chancellor's conscience and the principles of equity, and its granting or denial would become the obligatory by-product of judgments awarding or denying damages under the rules of law.

The truth is that estoppel by judgment, or *res judicata,* has no place in this case because a claim for treble damages and a claim for equitable relief are not one cause of action, even though both are based upon allegations of

the same violation of the antitrust laws. The right sought to be enforced in one case is compensation for past injuries, while in the other it is protection from threatened injury. These are not merely two kinds of relief, but are different and independent rights, as is demonstrated by the fact that in part they must be supported by different proof and are subject to different defenses. A plaintiff may not be able to prove past injury and yet may be able to obtain an injunction upon showing a threat of future damage. Conversely, it may be possible to establish an injury in the past, although no threat of future injury appears.

Bedford Co. v. *Stone Cutters Assn.*, 1927, 274 U. S. 37, 54.

Andersen v. *Shipowners' Ass'n of the Pacific Coast*, 9 Cir. 1929, 31 F. 2d 539, 543, certiorari denied, 1929, 279 U. S. 864.

Moreover, as is well illustrated by this case, relief, or partial relief, may be obtained on one claim by proof of only part of the conspiracy alleged, while full relief on the other claim may require proof of all that is alleged.

The two types of claims which a private party can make under the antitrust laws do not meet the test of identity laid down by the authoriies, which is that they must seek to enforce the same legal right, regardless of the form in which they are alleged. It is not enough that they overlap or that they depend in part upon proof of the same facts.

Baltimore S. S. Co. v. *Phillips*, 1927, 274 U. S. 316, 321.

Kelliher v. *Stone & Webster*, 5 Cir. 1935, 75 F. 2d 331, 333.

CONCLUSION.

We respectfully submit that both the District Court and the Circuit Court of Appeals, by their errors of law, have denied petitioners their day in court. Their combined errors amount to such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The decision of the Circuit Court of Appeals has squarely raised important questions under the due process clause of the Fifth Amendment and in the field of general law. For those reasons petitioners' prayer for a writ of certiorari should be granted.

Respectfully submitted,

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